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Supreme Court, U.S.
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In The

# Supreme Court of the United States

MINA SAMI GERGOS,

*Petitioner,*

v.

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the First Circuit overlooked a material principle of law in its decision affirming the order of the Board of Immigration Appeals by ignoring its own longstanding precedent holding that an agency cannot take a view of the law in one case that is flatly contrary to a view it set out in an earlier case without explaining why it is doing so. *See Davila-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994).

## PARTIES TO PROCEEDING

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## OPINION BELOW

The opinion of the Court of Appeals for the First Circuit was entered on December 16, 2003 under the caption *Gergos v. Ashcroft*, No. 03-1169 (1st Cir. 2003) (unpublished). The decision is attached hereto as Appendix B. Petitioner timely filed a Petition for Rehearing. The Petition for Rehearing was denied on February 9, 2004. The Order is attached hereto as Appendix A.

## STATEMENT OF JURISDICTION

By order entered December 16, 2003, the United States Court of Appeals for the First Circuit affirmed the decision of the Board of Immigration Appeals denying Petitioner's appeal of the decision of the Immigration Judge.

Petitioner timely filed a Petition for Rehearing with the First Circuit. The Petition for Rehearing was denied by order entered February 19, 2004. Petitioner thereafter timely filed this Petition for Writ of Certiorari. This Court has jurisdiction under 28 USC § 1254(1).

## CONSTITUTIONAL AND/OR STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution provides as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

## STATEMENT OF THE CASE

Petitioner is a native and citizen of Egypt where he was a member of the Coptic Christian minority. A.R. 98, 192. Egypt is an overwhelmingly Muslim country wherein there is a large and growing number of active fundamentalists groups that seek to rid Egypt of all non-Christians. A.R. 38, 41. As an active and practicing Coptic Christian, Petitioner experienced physical beatings, verbal harassment, and threats from Muslim employees and neighbors who resented the manner in which Petitioner performed his duties as farm manager. A.R. 104-116, 178-183. Petitioner eventually left his position as farm manager for fear of further harm. A.R. 115, 116, 183. He thereafter obtained new employment but continued to experience physical and verbal harassment because of his religious beliefs. A.R. 116, 117, 118-122, 183, 184.

Petitioner arrived in the United States on March 7, 1999. A.R. 78, 190. Approximately two months after arrival, Petitioner applied for asylum with the Immigration and Naturalization Service (now known as the Department of Homeland Security, Bureau of Citizenship and Immigration Services) based on beatings and harassment he suffered in Egypt because of his Coptic Christian religion. A.R. 153. He was subsequently placed in removal proceedings where he renewed his request for asylum before the Immigration Court.[1] A.R. 497.

After the hearing, the IJ denied Petitioner's application for asylum, withholding of removal, protection under

[1] Petitioner also applied for withholding of removal and protection under the Convention Against Torture.

the Convention Against Torture, and his request for voluntary departure.[2] A.R. 78-85. It is important to note that the IJ made a bifurcated credibility finding wherein she specifically stated that she found Petitioner credible as to the incidents that occurred relating to his farm manager position, but not credible as to the incidents that occurred after he left that position. A.R. 80.

Petitioner timely filed an appeal of the IJ's decision with the BIA. A.R. 70. By order dated January 6, 2003, the BIA affirmed, without opinion, the IJ's decision. A.R. 3. Petitioner thereafter timely filed a Petition for Review in the First Circuit Court of Appeals. This petition for review was based on a final agency determination. 8 USC § 3.1(a)(7). The First Circuit had jurisdiction based upon 8 USC § 1252(a)(2)(B)(ii).

At his hearing before the Immigration Court, in his appeal to the BIA and in the brief supporting his Petition for Review, Petitioner repeatedly raised the issue of an earlier unpublished BIA decision wherein the BIA stated:

> A review of the record of these proceedings reveals, **without any doubt whatsoever**, that **anti-Christian animus goes unchecked in Egypt**. We have also considered the **ongoing persecution faced by the Coptic Christian Community** in Egypt. Our review leaves no doubt that to **be a Coptic Christian in Egypt places such an individual at some risk because of his or her religion**, and that risk can

[2] Petitioner sought review only as to the denial of his applications for asylum and withholding of removal.

> rise to the level required for establishing a well-founded fear of persecution. (internal citations omitted) (emphasis added)

*In re: R-G-*, A70 578 039, BIA March 27, 1997. A.R. 262.

In a summary decision of December 16, 2003, the First Circuit affirmed the BIA's decision. Yet, nowhere in the First Circuit's decision did it even address Petitioner's argument concerning the BIA's significant and unexplained departure from its assessment of the plight of Egypt's Coptic Christians set forth in the *R-G-*case.

Petitioner thereafter timely filed a Petition for Rehearing with the First Circuit wherein he argued that its decision of December 16th violated standing precedent set forth in *Davila-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994). By order dated February 19, 2004, the First Circuit denied the Petition for Rehearing.

## ARGUMENT

By failing to address this blatant inconsistency between the BIA's decision in Petitioner's case and its decision in the factually similar *R-G-* case, the First Circuit overlooked a material principle of law from its precedent case of *Davila-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994). *See also Harrington v. Chao*, 280 F.3d 50, 59 (1st Cir. 2002).

In the *Davila-Bardales* case, the First Circuit considered the BIA's decision to accept admissions made by an unrepresented minor to immigration officials against earlier unpublished decisions wherein the BIA had stated that such admissions would be considered inherently

suspect and could only be admitted after careful review of evidence offered to prove that such statements were not the result of coercion or physical abuse. *Davila-Bardales v. INS*, 27 F.3d at 4. The First Circuit expressed particular concern with the change in the BIA policy previously established in three unpublished decisions because it would lead to an agency "adopting significantly inconsistent policies that result in the creation of 'conflicting lines of precedent governing the identical situation.'" *Id.* at 5 (internal citations omitted).

Although an agency retained the freedom to "refine, reformulate, and even reverse [its] precedents in the light of new insights and changed circumstances," the First Circuit said that before an agency can "depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable." *Id.* (internal citations omitted). The fact that the BIA's earlier decisions were unpublished gave no pause to the First Circuit's consideration of the issue:

> Put bluntly, we see no earthly reason why the mere fact of nonpublication should permit an agency to take a view in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases without explaining why it is doing so. Hence, we do not believe that the BIA, in the circumstances at hand, can take refuge behind the determination not to publish. . . . "

*Davila-Bardales v. INS*, 27 F.3d at 5-6.

Yet, despite the BIA's specific and clearly stated observations and conclusions in *R-G-* concerning the "unchecked anti-Christian animus" and "ongoing persecution faced by the Coptic Christian Community in Egypt,"

the First Circuit affirmed the BIA's summary decision without requiring the agency to explain the obvious and drastic conflict of opinion and policy between *R-G-* and in Petitioner's case.

The facts of the *R-G-* case are essential not only for their similarity to Petitioner's situation, but mostly because the incidents R-G- experienced, while significant, did not involve a direct physical beating such as that Petitioner suffered. In *R-G-*, an Egyptian Coptic Christian sought asylum in the United States because of mistreatment he suffered on account of his religion. The BIA decision states that R-G- was assaulted and threatened on numerous instances, subjected to physical and psychological coercion, received death threats, was repeatedly pressured by co-workers to convert to Islam, was denied employment opportunities, had his home ransacked, and had his car stolen and destroyed. He was also subject to the general public defamation and apprehension of attack that all Coptic Christians in Egypt experience on a daily basis. *In re: R-G-*, at p. 1-2.

It is important to note that in its decision, the BIA found that the incidents to which R-G- testified did not rise to the level of past persecution. Significantly, however, the BIA concluded that in light of the dangerous situation confronting Coptic Christians in Egypt, R-G- had demonstrated a well-founded fear of future persecution were he to return to Egypt. "In light of the harassment and intimidation suffered by [R-G-] on account of his Coptic Christian religion, because he was an active member of his church, and because perpetrators of anti-Christian violence have the ability to carry out acts of violence unchecked, we find that [R-G] has established a well-founded fear of persecution in Egypt." *In re: R-G-*, at p. 6.

It is important to note that the BIA did not state how much weight it placed on each of these three mentioned bases for the treatment suffered by R-G-, thus we cannot assume that any one is more important than another. Moreover, it is equally important that the BIA's conclusions on the plight of Coptic Christians in Egypt were not specific to R-G-. Indeed, the BIA's own language and references makes it clear that these conclusions were based on a review of the evidence relating to country conditions and not evidence directly relating to R-G-'s particular experiences.[3]

Accordingly, in that Petitioner was a practicing Coptic Christian in Egypt, was harassed, intimidated, and beaten because of his Coptic Christian religion, and the perpetrators of this anti-Christian violence still retain the ability to carry out acts of violence unchecked, there is no basis in

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[3] The relevant language quoted earlier omitted internal citations: A review of the record of these proceedings reveals, without any doubt whatsoever, that anti-Christian animus goes unchecked in Egypt. We have also considered the ongoing persecution faced by the Coptic Christian Community in Egypt. *See Matter of SMJ*, Int. Dec. 3303 (BIA 1997); *Country Reports on Human Rights Practices for 1995*, Committee on International Relations U.S. House of Representatives and the Committee on Foreign Relations U.S. Senate, 104th Congress 2d Session (April 1996). Our review leaves no doubt that to be a Coptic Christian in Egypt places such an individual at some risk because of his or her religion, and that risk can rise to the level required for establishing a well-founded fear of persecution. *Makonnen v. INS*, 44 F.3d 1378 (8th Cir. 1995); *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994).

*In re: R-G-*, at p. 6.

The BIA also referenced the 1992 Country Reports on Human Rights Practices and the December 1994 "Egypt-Profile of Asylum Claims and Country Conditions" report prepared by the U.S. Department of State. *Id.* at p. 4.

law or fact to support a conclusion different than that stated by the BIA in the *R-G-* case or to permit the BIA to make reach such a significantly different without explanation subject to judicial review. *See Davila-Bardales v. INS*, *supra*; *Harrington v. Chao*, *supra*.

## CONCLUSION

Based on the forgoing, Petitioner respectfully asks this Court to grant this petition and address the issues of fundamental fairness and judicial review raised in this case.

Sincerely,

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## APPENDIX

Appendix A: Opinion of the United States Court of Appeals for the First Circuit, Docket No. 03-1169, Judgment Entered December 16, 2003: Decision of Board of Immigration Appeals Affirmed.....App. 1

Appendix B: Opinion of the Executive Office for Immigration Review, Board of Immigration Appeals, Agency No. A76 130 866, Order Entered January 6, 2003: Affirming Without Opinion the Decision of the Immigration Court .....App. 3

Appendix C: Opinion of the Executive Office for Immigration Review, Office of the Immigration Judge, Agency No. A76 130 866, Order Entered November 17, 1999: Denying Petitioner's Applications for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture....App. 4

Appendix D: Opinion of the United States Court of Appeals for the First Circuit, Docket No. 03-1169, Order of Court Entered February 19, 2004: Petition for Rehearing Denied .....App. 11

**APPENDIX A**

**United States Court of Appeals**
**For the First Circuit**

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No. 03-1169

MINA SAMI GERGOS,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

Boudin, *Chief Judge,*
Selya and Lipez, *Circuit Judges.*

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JUDGMENT

Entered: December 16, 2003

The Board of Immigration Appeals affirmed, without opinion, the decision of the Immigration Judge denying petitioner's application for asylum and withholding of deportation. Under the circumstances, the decision of the Immigration Judge is the final agency decision for judicial review purposes. *Albathani* v. *INS*, 318 F.3d 365, 373 (1st Cir. 2003). On the basis of the record, including a transcript of the oral decision of the Immigration Judge, we conclude that petitioner has not provided evidence so compelling that no reasonable factfinder could have failed to find him eligible for the relief requested. *Yatskin* v. *INS*, 255 F.3d 5, 9 (1st Cir. 2001). Petitioner did not carry his burden of demonstrating eligibility for asylum either by demonstrating past persecution or a well-founded fear of

persecution. *See El Moraghy* v. *Ashcroft*, 331 F.3d 195, 202 (1st Cir. 2003).

The decision below is *affirmed.* 1st Cir. R. 27 (c).

## APPENDIX B

**U.S. Department of Justice**
**Executive Office for Immigration Review**
**Falls Church, Virginia 22041**

**Decision of the Board of Immigration Appeals**

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File: A76-130-866-Boston Date: JAN 06, 2003

In re: GERGOS, MINA SAMI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Macarius, Saher, Esq.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

/s/ [ILLEGIBLE]
FOR THE BOARD

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## APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATOIN REVIEW
IMMIGRATION COURT
Boston, Massachusetts

File No.: A 76 130 866 November 17, 1999

| | | |
|---|---|---|
| In the Matter of | ) | |
| MINA SAMI GERGOS | ) | IN REMOVAL PROCEEDINGS |
| Respondent | ) | |

CHARGE: Section 237(a)(1)(B) – remained longer than authorized after admission as nonimmigrant.

APPLICATIONS: Asylum pursuant to Section 208(a) of the Immigration and Nationality Act; withholding of removal pursuant to Section 241(b)(3) of the Immigration and Nationality Act; voluntary departure pursuant to Section 240B of the Immigration and Nationality Act; and relief under the U.N. Convention Against Torture, Article 3.

| ON BEHALF OF RESPONDENT: | ON BEHALF OF SERVICE: |
|---|---|
| Saver Zacarias | Mr. Neville<br>INS Trial Attorney<br>Boston, Massachusetts |

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in these proceedings is a 26-year-old, native and citizen of Egypt. He arrived in the United States on a visitor's visa, was admitted as a B1 visitor for

business on March 7, 1999. His admission to the United States was for a period of approximately 60 days until May 5, 1999. He was placed into removal proceedings after referral of an asylum application which was filed with the Immigration Service asylum office on or about May 10 of 1999. The Notice to Appear is dated July 28, 1999 and was mailed to the respondent on August 23, 1999. *See* Exhibits 1 and 2.

Through counsel, the respondent has admitted the four factual allegations contained in the Notice to Appear, conceding that he has remained longer than authorized after his admission as a nonimmigrant, and has sought relief in the form of asylum, withholding of removal, and relief under the U.N. Convention Against Torture, and in the alternative voluntary departure.

With respect to voluntary departure, the respondent has made an alternate form of relief request and since he has not been present in the United States for one year prior to these proceedings being initiated, he is not eligible for voluntary departure pursuant to Section 240B of the Immigration and Nationality Act.

With respect to relief under the U.N. Convention Against Torture, the respondent's counsel has made no argument nor has he indicated any way in which he would be tortured upon his return while in custody or detention nor he has indicated any way that the authorities given notice of this would fail to exercise their duties to protect him or to prevent torture.

With respect to the asylum claim which will also be treated as an application for withholding of removal, the Court finds that the respondent has failed to establish eligibility for asylum insofar as he has failed to establish

that a reasonable person in his circumstances would fear harm in his home country on account of race, religion, nationality, membership in a particular social group, or a political opinion.

The respondent has in essence claimed that as a permanent member of the Coptic christian community, he has been targeted in the past and that he will be harmed or killed he returns to Egypt on that account.

The Court notes that although I find the respondent has testified truthfully in these proceedings concerning the incidents which occurred after the purchase of the land by his two uncles insofar as his difficulties with a neighbor who was a cleric and insofar as he was essentially forced off the land, the Court believes that this respondent has exaggerated the incidents which occurred after he left the land.

The Court notes that this land was purchased for the respondent to manage in June of 1997. He apparently continued on the land until August or September of 1998. His difficulties arose because he fired four individuals from the land whose associates then attacked him. Prior to the firing of these individuals, the harm that had befallen him was essentially because of his requiring employees to return immediately from prayers on the adjacent land at the close of a 15-minute prayer session, apparently trees on the farm were destroyed. He was certainly identified as being a christian who was the first christian to own land in the area, but the only incident of actual harm befalling him was after he terminated the employment of four farmers. The respondent has indicated he did not have difficulty with the manager of the property who was a Moslem or with the other five employees.

The Court notes that as pointed out by the Government the documents submitted by the respondent in Exhibit 2, specifically the Human Rights Watch *World Reports* for 1998 indicate that during that year passions ran high in the countryside as grassroots organizing proliferated and advanced in implementation in October of the agricultural reform law which lifted rent controls and protection against eviction which had been put in place during the Nasser era in the 1950s.

The respondent after leaving off the land in either August or September of 1998 apparently found employment with Domino's Pizza. He has indicated his position was an assistant director of international relations, that he was promoted shortly after his initial employment began in October of 1998 to full director. Almost immediately after assuming that position, the respondent then applied for and obtained a visa to come to the United States, under the B1, B2 visa and then traveled to the United States in a B1 capacity, arriving in March of 1999.

He would ask the Court to believed that two of the four people who beat him up after he terminated the employment of four farmers essentially followed him around on a full-time basis both to and from work in Alexandria and everywhere else and that they beat him up on two occasions, one in the beginning of February, 1999 in front of his home and another time in front of his employment in the middle of February, 1999.

Quite frankly, the respondent himself has indicated that nobody objectively would have been able to understand what was happening, but that he knew these people were there and followed him down the street, yelling curses, and telling him that he had to convert to be a

Moslem, that no one could escape them. He said that this was a constant annoyance to him. On one occasion, two men gave an example to him of a permanent member of the christian community who had been killed, the killers whom had escaped apprehension by the police. The respondent felt a serious threat that he would be abducted or molested.

The respondent traveled to Cairo in December of 1998 at which time he obtained his visa to come to the United States. He indicated that because Moslem fanatics existed throughout the country that he did not feel safe anywhere.

The Court notes that the respondent has indicated that his two uncles remain in Alexandria, still own the land, and put the land up for sale. The same manager, to the best of his knowledge, continues to manage the farm. His two brothers continue to reside with his mother in Alexandria and none of these people has ever had any problems. Thus, it appeared that the respondent's sole problem derives from his interaction with individuals while he was managing family-owned properties.

The Court is unable to say that notwithstanding the incidents in Egypt which are undisputed with respect to the rise of fundamentalist violence that this respondent has ever been targeted by such individuals other than on account of a dispute over the land, the use of the land, and the freedom of family employees to practice their religion and the disputes over the taking of his property and their inferences being apportioned on him because he allowed the taking of the property to happen that has somehow converted to the respondent, to rest on the respondent.

The Court believes that this respondent was able to leave the land, he obtained employment in line with that

which he graduated from the university the year earlier with a degree, that he used his employment as a means of leaving Egypt, that he could have established a life either in Alexandria or if he did not feel safe in Alexandria elsewhere.

In order for this Court to find that this respondent has established a well-founded fear, the Court would have to find that any and all Coptic christians in Egypt have a well-founded fear of persecution. The Court notes there is some risk to all Coptic christians in Alexandria, but the Court does not believe that it rises to the level of risk that is required for an asylum application.

The respondent's only younger brother came to the United States apparently in 1998 and returned to Egypt. As the respondent has indicated, he used that evidence of that trip and that return in order to obtain his own visa to come to the United States. He has indicated that his brother has met no harm.

The Court believes that in order for a reasonable person to establish that because of general conditions they have a well-founded fear of persecution in their home country, they must show that people in their class suffer such a pervasive threat that they are unable to safely go to work, safely reside in their own home, safely obtain an education, or safely otherwise live a complete life.

This respondent was never forced to leave his home because of his fears, he was never forced to leave his employment because of his fears. He appears to have exaggerated to this Court what happened after he left the family farm. While I otherwise find him credible, I find that his travel to the United States was not in fact occasioned because of the incident which occurred in February.

Because I find that he has failed to establish a threshold level that would allow a finding of a well-founded fear of persecution, it also follows that the respondent has failed to establish a clear probability of persecution as required for withholding of removal to Egypt.

Because the respondent is not eligible for any other form of relief, it is hereby the order of this Court that the respondent's application for voluntary departure be denied insofar as he is ineligible, his application for relief under the U.N. Convention Against Torture be denied for failure to establish any evidence to support such a claim or to even argue such a claim, his applications for asylum and withholding are denied because of a failure to meet the burden of proof.

It is accordingly the order of this Court that the respondent be removed from the Untied States to Egypt as previously designated.

ELIZA C. KLEIN
Immigration Judge

## APPENDIX D

**United States Court of Appeals**
**For the First Circuit**

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No. 03-1169

MINA SAMI GERGOS,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

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Before

Boudin, *Chief Judge*,
Selya and Lipez, *Circuit Judges*.

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ORDER OF COURT

Entered: February 19, 2004

*Davila-Bardales* v. *INS*, 27 F.3d 1, 4-5 (1st Cir. 1994) (precluding rejection without explanation by Board of Immigration Appeals of then current procedural regulation) does not control this case. The instant petition turns on findings of fact that, under *Yatskin*, v. *INS*, 255 F.3d 5, 9 (1st Cir. 2001), we properly declined to disturb on review of the decision of the Board of Immigration Appeals. The petition for rehearing is *denied*.

By the Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk.